In The

Supreme Court of the United States

October Term, 1989

JAMES B. BEAM DISTILLING CO.,

Petitioner,

v.

STATE OF GEORGIA, JOE FRANK HARRIS, individually and as Governor of the State of Georgia, MARCUS E. COLLINS, individually and as Georgia State Revenue Commissioner, and CLAUDE L. VICKERS, individually and as Director of the Fiscal Division of the Department of Administrative Services,

Respondents.

On Petition For Certiorari
To The Supreme Court of Georgia

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

Whether the Georgia Supreme Court properly found, under the *Chevron Oil* test, that its decision invalidating a longstanding alcoholic beverage tax under the principles of law established in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), should apply prospectively only.

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CITATIONS TO OPINION BELOW

The opinion of the Supreme Court of Georgia is officially reported at 259 Ga. 363 (1989), and is unofficially reported at 382 S.E.2d 95 (1989). In addition, the text of the opinion is included in the Joint Appendix ("J.A."). J.A. 100.

STATEMENT OF JURISDICTION

Respondents concur in the Petitioner's statement of the grounds on which the jurisdiction of this Court is invoked.

STATUTORY PROVISION AT ISSUE

The statute at issue in this case is O.C.G.A. § 3-4-60 as it existed prior to its amendment in 1985. The text of O.C.G.A. § 3-4-60 as it then existed is included in the Joint Appendix. J.A. 18.

STATEMENT OF THE CASE

On August 24, 1987, Petitioner, James B. Beam Distilling Company (hereinafter "Beam"), brought this action challenging the constitutionality of O.C.G.A. § 3-4-60, as codified in 1982, 1983 and 1984 (hereinafter "the claim period"), and, pursuant to O.C.G.A. § 48-2-35(a), claimed a refund of $2,400,000 for taxes paid under the now repealed statute. As codified during the claim period, O.C.G.A. § 3-4-60 imposed taxes on all alcoholic beverages manufactured in or imported into Georgia. Under the provisions of the statute, alcoholic beverages imported into the state by either in-state or out-of-state producers or manufacturers were subject to a higher tax than alcoholic beverages manufactured in Georgia. 1981 Ga. Laws 1269, § 35; O.C.G.A. § 3-4-60 (Michie 1982).

A tax structure similar to that embodied by O.C.G.A. § 3-4-60 had been in effect in Georgia since 1938. The

original legislation imposing taxes on alcoholic beverages manufactured and imported into Georgia was enacted in 1938 as Section 11 of the "Revenue Tax Act to Legalize and Control Alcoholic Beverages and Liquors" (hereinafter the "1938 Act"). 1937-38 Ga. Laws (Ex. Sess.) 103.

Enacted not long after the end of Prohibition and the adoption of the Twenty-first Amendment, the 1938 Act was intended to provide for the "taxation, legalization, control, manufacture, importation, distribution, sale and storage of alcoholic beverages." 1937-38 Ga. Laws (Ex. Sess.) 103. Under Section 11 of the Act, imported alcoholic beverages were subject to a higher tax than alcoholic beverages manufactured in Georgia.

Shortly after its enactment, Section 11 of the 1938 Act was challenged on the grounds that it violated the Commerce Clause of the United States Constitution. In *Scott v. State*, 187 Ga. 702, 2 S.E.2d 65 (1939), *overruled on other grounds*, *Blackston v. Georgia Department of Natural Resources*, 255 Ga. 15, 334 S.E.2d 679 (1985), the Georgia Supreme Court upheld the constitutionality of Section 11 finding that "the right of a State to prohibit or regulate the importation of intoxicating liquors is not limited by the Commerce Clause." 187 Ga. at 705, 2 S.E.2d at 66 (citations and internal quotations omitted). In support of its holding, the Georgia Supreme Court cited the opinions of this Court in *Joseph S. Finch & Co. v. McKittrick*, 305 U.S. 395 (1939), *Indianapolis Brewing Co. v. Liquor Control Commissioner*, 305 U.S. 391 (1939), *Mahoney v. Joseph Triner Corp.*, 304 U.S. 401 (1939), and *State Board of Equalization v. Young's Market Co.*, 299 U.S. 59 (1936).

Since 1938, the tax system created by Section 11 of the 1938 Act has been amended several times to revise rates and effect other minor changes. The most recent amendment was in 1985, which amendment repealed the statute at issue in this case. The Georgia legislature enacted the 1985 Amendment in response to this Court's ruling in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984) (hereinafter "*Bacchus*") and at the legislature's first opportunity to address the issues raised in *Bacchus*. In enacting the 1985 Amendment, which also imposed a direct tax on the importation of alcoholic beverages into Georgia, the Georgia legislature found that a tax on importation was necessary to offset the increased cost of regulating imported alcoholic beverages. 1985 Ga. Laws 665 (the cost of regulating imported alcoholic beverages is greater than that for locally manufactured alcoholic beverages); O.C.G.A. § 3-4-60 (Michie 1989 Supp.).

In April of 1985, in the first challenge to Georgia's tax on imported alcoholic beverages since the *Scott* case in 1939, the 1985 Amendment was challenged on Equal Protection and Commerce Clause grounds. The Georgia Supreme Court, as it had in *Scott*, upheld the constitutionality of the tax structure, finding that the unchallenged purpose of the import tax, as set forth in the law, implicated central concerns of the Twenty-first Amendment and did not violate the Commerce Clause. *Heublein, Inc. v. Georgia*, 256 Ga. 578, 351 S.E.2d 190, *appeal dismissed*, 483 U.S. 1013 (1987). This Court effectively affirmed the decision in *Heublein* by declining further review of the Georgia Supreme Court's decision; the 1985 Amendment is not at issue in this case.

Also in April of 1985, Beam filed a claim with the Georgia Revenue Department for a refund of taxes allegedly paid pursuant to O.C.G.A. § 3-4-60, as the statute existed during the claim period (hereinafter the "pre-*Bacchus* statute"), challenging the constitutionality of the statute which was by then repealed. J.A. 10-13. This claim represented the first occasion on which Beam had ever challenged Georgia's alcoholic beverage tax, having never paid its tax to Georgia under protest or sought any protection from paying the tax.

On April 24, 1987, Beam filed this tax refund action in Fulton County Superior Court pursuant to O.C.G.A § 48-2-35(a). In its Complaint, Beam challenged the pre-*Bacchus* statute on the grounds that its tax provisions relating to alcoholic beverages manufactured outside of Georgia violated the Commerce Clause and the Equal Protection Clause of the United States Constitution. J.A. 2.

This matter came before the trial court on cross motions for summary judgment. After hearing these motions, the Superior Court of Fulton County, on May 27, 1988, entered an order holding the pre-*Bacchus* statute unconstitutional under the Commerce Clause. However, the trial court, after applying the nonretroactivity test set forth in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), directed that its decision on the statute's constitutionality apply prospectively only, and that Beam, therefore, recover nothing on its claim for refund of the taxes paid in the past. J.A. 29-31.

Beam appealed the trial court's "prospectivity" holding to the Supreme Court of Georgia, urging that Georgia's refund statute required a refund as a matter of state law. The Georgia Supreme Court, in a decision dated July

14, 1989, ruled that the Georgia refund statute did not mandate a refund, and that the trial court correctly interpreted Georgia law in applying its decision prospectively. J.A. 100. The court denied Beam's Motion for Rehearing on July 26, 1989.

Beam thereafter filed its Petition for Writ of Certiorari. This Court granted the Petition within one week of its rulings in *American Trucking Associations, Inc. v. Smith*, 58 U.S.L.W. 4704 (U.S. June 4, 1990) (No. 88-325) (hereinafter "*ATA*") and *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 58 U.S.L.W. 4665 (U.S. June 4, 1990) (No. 88-192) (hereinafter "*McKesson*").

SUMMARY OF ARGUMENT

This appeal raises issues essentially identical to those disposed of in the *ATA* case. As in *ATA*, the question before this Court is whether the Georgia Supreme Court properly gave prospective effect only to its decision invalidating Georgia's pre-*Bacchus* import tax on alcoholic beverages.

Relying on longstanding precedent of this Court, the Georgia Supreme Court applied the *Chevron Oil* test to its decision to determine whether the decision should apply prospectively only. The Georgia Supreme Court concluded that its decision, based upon the principles of law established in *Bacchus*, satisfied each of the three parts of the *Chevron Oil* test. Although the Georgia Supreme Court analyzed its own decision, rather than the *Bacchus* decision, under the *Chevron Oil* test, the *Bacchus* decision also satisfies each of the three parts of the *Chevron Oil* test.

In applying the first part of the *Chevron Oil* test, it is clear that the decision in *Bacchus* established a new principle of law by overruling past precedent on which Georgia had reasonably relied. In *Bacchus*, the Court recognized for the first time the existence of "central purposes" underlying the Twenty-first Amendment, which purposes did not include permitting "states to favor local liquor industries by erecting barriers to competition." *Bacchus*, 468 U.S. at 276. In a totally novel approach to the Twenty-first Amendment, the Court reasoned that state laws that regulate alcoholic beverages and also protect the local economy do not sufficiently implicate the "central purposes" of the Twenty-first Amendment so as to prevail over the Commerce Clause. Yet, prior to *Bacchus*, the Court had consistently recognized the right of a state to prohibit or regulate the importation of intoxicating liquor without limitation by the Commerce Clause. *See, e.g., Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964); *Mahoney v. Joseph Triner Corp.*, 304 U.S. 401 (1938); *State Board of Equalization v. Young's Market Co.*, 299 U.S. 59 (1936).

Although prior to *Bacchus* the Court had recognized some limitations on a state's power to regulate under the Twenty-first Amendment, the Court had not recognized any limitations on a state's power to regulate the importation of alcoholic beverages. Prior to *Bacchus*, the only types of cases in which the Court recognized limitations involved (1) state regulation of alcoholic beverages in direct conflict with federal regulation of interstate commerce, (2) state regulation of alcoholic beverages in direct conflict with certain provisions of the Constitution other than the Commerce Clause, and (3) state regulation of alcoholic beverages not destined for delivery or use in the state. *See* discussion *infra* pp. 16-20. At no time prior to

Bacchus, however, had the Court found that the Commerce Clause alone limited a state's power to regulate the importation of alcoholic beverages into its borders.

Bacchus, therefore, clearly established a new principle of law. Additionally, the Georgia Supreme Court opinion, based upon *Bacchus,* established a new principle of law by effectively overturning the prior opinion of the court in the case of *Scott v. State,* 187 Ga. 702, 2 S.E.2d 65 (1939). In *Scott v. State,* the Georgia Supreme Court upheld the constitutionality of the predecessor to the statute at issue, finding that the right of the state to prohibit or regulate the importation of alcoholic beverages was not limited by the Commerce Clause. The holding in *Scott* remained unchallenged until the filing of Beam's refund claim in 1985. In light of the precedents of this Court and the Georgia Supreme Court, therefore, Georgia had no reason to expect that its pre-*Bacchus* statute would be invalidated.

Bacchus also meets the second part of the *Chevron Oil Test* which requires a determination of whether retroactive application of the rule in question will further the rule's purpose. As in *ATA,* the Commerce Clause does not dictate retroactive application of the new principle of law established in this case. As the Court in *ATA* noted, "it was not the purpose of the Commerce Clause to prevent legitimate state taxation of interstate commerce." *ATA,* 58 U.S.L.W. at 4708. Because the pre-*Bacchus* statute was "legitimate state taxation of interstate commerce" prior to the decision in *Bacchus,* the Commerce Clause would not be furthered by retroactive application of *Bacchus.* Furthermore, retroactive application is not necessary to deter future violations by Georgia as the statute at issue has been repealed and replaced with a constitutionally valid

amendment. *Heublein, Inc. v. State,* 256 Ga. 578, 351 S.E.2d 190, *appeal dismissed,* 483 U.S. 1013 (1987).

Finally, a balancing of the equities in this case, as called for by the third part of the *Chevron Oil* test, clearly favors prospective application of *Bacchus* and the Georgia Supreme Court decision based upon it. The State of Georgia collected the taxes at issue in good faith reliance on longstanding precedents of this Court and its own supreme court. Indeed, not even Beam can seriously argue that Georgia acted in bad faith in collecting the taxes at issue when Beam did not challenge the pre-*Bacchus* statute until after the statute had been repealed in response to *Bacchus.* In light of Georgia's good faith reliance on a presumptively valid statute, it would be unjust and unfair to require it to refund some $30,000,000 in taxes. Retroactive application of the decision in *Bacchus* would create substantial economic hardship for Georgia at a time when the state is struggling to find the revenues to pay for billions of dollars in infrastructure needs.

Because the decision in *Bacchus* and the Georgia Supreme Court decision in this case satisfy the *Chevron Oil* test, prospective application of the Georgia Supreme Court decision is appropriate. Contrary to Beam's arguments, the reasoning and analysis in *McKesson* are inapplicable here. Unlike the Florida Supreme Court decision involved in *McKesson,* the Georgia Supreme Court decision at issue here was not based upon established principles of Commerce Clause jurisprudence, but upon a new principle of law. Because this case does not involve the application of settled principles of law, as in *McKesson,* the analysis used in that case is not controlling here.

ARGUMENT

I. THE GEORGIA SUPREME COURT PROPERLY GAVE PROSPECTIVE APPLICATION ONLY TO ITS DECISION INVALIDATING THE PRE-*BACCHUS* STATUTE.

Relying on longstanding precedent of this Court, the Georgia Supreme Court applied the nonretroactivity test in *Chevron Oil* to its decision invalidating the pre-*Bacchus* statute to determine whether its ruling should be given prospective application. Upon applying the *Chevron Oil* test, the Georgia Supreme Court concluded that its decision, based upon the principles of law established in *Bacchus*, should be given prospective effect only.

Since the Georgia Supreme Court entered its decision in this case, this Court, in the *ATA* case, has reaffirmed that the United States Constitution permits the prospective application of constitutional decisions of the Court and that the "retroactivtiy of decisions in the civil context continues to be governed by the standard announced in [*Chevron Oil*]." *ATA*, 58 U.S.L.W. at 4707 (citations and internal quotations omitted);[1] *see also Ashland Oil, Inc. v. Caryl*, 58 U.S.L.W. 3832 (U.S. June 28, 1990) (No. 88-421); *National Mines Corp. v. Caryl*, 58 U.S.L.W. 3831 (U.S. June 28, 1990) (No. 89-337). The three part *Chevron Oil* test, as used in *ATA*, provides as follows:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, . . . we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation. Finally, we [must] weig[h] the inequity imposed by retroactive application, for where a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the injustice or hardship by a holding of nonretroactivity.

Chevron Oil v. Huson, 404 U.S. at 106-107 (citations and internal quotations omitted).

In the *ATA* case, the issue before the Court was whether the Arkansas Supreme Court had properly applied *Chevron Oil* to the Court's decision in *American Trucking Associations, Inc. v. Scheiner*, 483 U.S. 266 (1987), holding certain taxes to be unconstitutional. Using the first part of the *Chevron Oil* test, the Court found that the Arkansas Supreme Court correctly concluded that *Scheiner* established a new principle of law by overturning the holdings in earlier cases. Under the second part of the test, the Court found that the Commerce Clause did not dictate retroactive application of the *Scheiner* decision because the Commerce Clause was not intended to prevent legitimate state taxation, which the Arkansas tax statute had been prior to the *Scheiner* decision. Finally, in balancing the equities of the retroactive application of *Scheiner*, the Court found that where the state had relied upon decisions of its highest court and of this Court in collecting and spending the taxes at issue, a retroactive

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[1] Although the Court in *ATA* was divided on the issue of whether a constitutional decision in a civil case could ever be given prospective effect only, Beam has not raised as an issue in this case the differences between the dissent and the plurality in *ATA*.

application requiring a refund would "produce substantial inequitable results." 58 U.S.L.W. at 4709.

The instant appeal presents issues essentially identical to those disposed of in the *ATA* case. Before the Court in this case, as in *ATA*, is the issue of whether the Georgia Supreme Court's decision invalidating the pre-*Bacchus* statute applies prospectively only in light of the *Chevron Oil* test. Like the *Scheiner* decision in *ATA*, the *Bacchus* decision, upon which the Georgia Supreme Court relied, established a new principle of law which Georgia could not have reasonably foreseen. Although the Georgia Supreme Court analyzed its own decision, rather than the *Bacchus* decision, under the *Chevron Oil* test, the following discussion clearly shows that the *Bacchus* decision, like the Georgia Supreme Court's decision, satisfies each of the three parts of the *Chevron Oil* test.

A. *Bacchus* Established A "New Principle Of Law" By Overruling Clear Past Precedent Upon Which Georgia Relied.

As with the *Scheiner* decision in *ATA*, the *Bacchus* decision easily meets the first test for nonretroactive application. Indeed, the three member dissent in *Bacchus* pointed out that the majority's analysis of the Twenty-first Amendment in *Bacchus* constituted a "totally novel approach to the Twenty-first Amendment", unsupported by the express language of the Twenty-first Amendment[2] and earlier Court decisions. *Bacchus*, 468 U.S. at 286-287.

[2] Section 2 of the Twenty-first Amendment provides:

> The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

The issue before the Court in *Bacchus* was a Commerce Clause challenge to a Hawaii statute that exempted two local products entirely from an excise tax imposed on all other alcoholic beverages. As noted by the Court, the express purpose of the Hawaii statute – unlike the Georgia statute at issue here – was to promote local industry. The Court first analyzed the Hawaii statute under a strict Commerce Clause analysis because Hawaii attempted to defend its statute on Commerce Clause grounds alone. After finding Hawaii's statute unconstitutional under a traditional Commerce Clause analysis, the Court addressed Hawaii's belated Twenty-first Amendment argument.[3] Based upon the express language of the Hawaii statute to promote local industry, the Court concluded that the *sole* purpose of the statute was simple economic protectionism and was not supported by "any clear concern of the Twenty-first Amendment." *Bacchus*, 468 U.S. at 276. The Court, therefore, rejected Hawaii's Twenty-first Amendment defense, holding the Hawaii statute to be unconstitutional because of the burden it placed on alcoholic beverages imported into Hawaii.

The holding in *Bacchus* clearly went beyond existing Twenty-first Amendment case law. For the first time, the Court recognized the existence of "central purposes" underlying the Twenty-first Amendment, which purposes did not include permitting "states to favor local liquor industries by erecting barriers to competition." 468 U.S. at 276.[4] In light of these "central purposes," the Court

[3] Hawaii raised the Twenty-first Amendment for the first time in the United States Supreme Court.

[4] The "central purposes" identified by the Court are not found in the language of the Amendment or its legislative history.

reasoned that state laws that regulate alcoholic beverages and also protect the local economy are not entitled to the same deference as "laws enacted to combat the perceived evils of unrestricted traffic in liquor." *Id.* Yet, prior to *Bacchus*, the Court had upheld state laws that regulated the importation of alcoholic beverages, even where the regulation also protected the local economy. *See, e.g., Mahoney v. Joseph Triner Corp.*, 304 U.S. 401 (1938); *State Board of Equalization v. Young's Market Co.*, 299 U.S. 59 (1936).

Beginning with the Court's opinion in *Young's Market*, up until the decision in *Bacchus*, the Court had consistently recognized that the Twenty-first Amendment reserved to the states "the power to impose burdens on interstate commerce in intoxicating liquor that, absent the Amendment, would clearly be invalid under the Commerce Clause." *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 712 (1984). In *Young's Market*, one of the first cases to interpret the Twenty-first Amendment, the Court considered a Commerce Clause challenge to a California license tax on the privilege of importing beer into the state. In rejecting the constitutional attack, the Court recognized that the right to import without restriction has been "abrogated . . . so far as concerns intoxicating liquors" by the Twenty-first Amendment. *Young's Market*, 299 U.S. at 62. Noting that the Twenty-first Amendment empowered a state to forbid all importations into its territory, the Court went on to observe that "[s]urely the State may adopt a lesser degree of regulation than total prohibition" such as subjecting the foreign article to a heavy importation fee. 299 U.S. at 63. The Court held, therefore, that

> in the light of history, we cannot say that the exaction of a high license fee for importation may not, like the imposition of the high license fees exacted for the privilege of selling at retail, serve as an aid in policing the liquor traffic.

Id.

In cases following *Young's Market*, the Court continued to recognize the right of a state to prohibit or regulate the importation of intoxicating liquor without limitation by the Commerce Clause. *See Joseph S. Finch & Co. v. McKittrick*, 305 U.S. 395 (1939) (upheld a "retaliation" statute by which Missouri made it illegal to import liquor from any state that restricted the importation of Missouri liquor); *Indianapolis Brewing Co. v. Liquor Control Commission*, 305 U.S. 391 (1939) (upholding a "retaliation" statute which barred liquor imports from those states that prescribed shipments of liquor from other states); *Mahoney v. Joseph Triner Corp.*, 304 U.S. 401 (1938) (upholding state law which prohibited importation of liquor of more than twenty-five percent alcohol content not registered with the United States Patent Office but which did not apply to domestically manufactured liquors). The Court, however, also recognized in cases subsequent to *Young's Market* that the Twenty-first Amendment did not operate to divest Congress of all regulatory power over interstate and foreign commerce in intoxicating liquors and that the exercise of federal powers in some concrete circumstances limited a state's broad power to regulate intoxicating liquors. *See California Retail Liquor Dealers Assoc. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980). But, as a review of the case law from *Young's Market* until *Bacchus* reveals, at no time before the 1984 decision in *Bacchus* did the Court find that

the Commerce Clause alone limits a state's right to regulate the importation of alcoholic beverages into its borders.

Indeed, the cases in which the Court recognized certain limitations on a state's exercise of its Twenty-first Amendment powers are so different from the case at hand that they cannot fairly or reasonably be said to have put the State of Georgia on notice that its pre-*Bacchus* statute was problematic. The cases in which the Court recognized limitations basically fall within three groups: (1) those cases in which the state attempted to regulate alcoholic beverages traveling *through* the state but not *into* the state for use therein; (2) those cases in which the state's regulatory authority conflicted with federal regulatory laws enacted under the Commerce Clause; and (3) those cases in which the state's regulatory authority conflicted with a provision of the Constitution other than the dormant Commerce Clause.[5]

In limiting the jurisdictional scope of a state's power under the Twenty-first Amendment, the Court in *Collins v. Yosemite Park & Curry Co.*, 304 U.S. 518 (1938), held that the Twenty-first Amendment did not give California the power to prevent shipments to and through her territory of liquors destined for a national park. According to the

[5] In its brief, Beam also cites to traditional Commerce Clause cases in support of its argument that *Bacchus* did not establish a new principle of law. *E.g., Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1984); *Philadelphia v. New Jersey*, 437 U.S. 617 (1978). None of these traditional Commerce Clause cases, however, involve the Twenty-first Amendment and thus do not constitute precedent in the area of Twenty-first Amendment case law.

Court, this traffic did not involve "transportation into California 'for delivery or use therein' " within the meaning of the Twenty-first Amendment. 304 U.S. at 538. Similarly, almost thirty years later, the Court, in *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964), found that the Twenty-first Amendment did not permit New York to regulate liquor shipped through the state of New York for ultimate use in a foreign country, rather than for use in New York. The Court in *Collins* and in *Hostetter*, therefore, established that a "shipment through a state is not transportation or importation into the state within the meaning of the Amendment." *Carter v. Virginia*, 321 U.S. 131, 137 (1944). Although noting this limitation on a state's jurisdictional power under the Twenty-first Amendment, the Court in *Hostetter* also noted that its earlier decisions holding that a state may restrict the importation of intoxicants unfettered by traditional Commerce Clause limitations remained unquestioned. *Hostetter*, 377 U.S. at 330.

The Court has also recognized limits on a state's regulatory power under the Twenty-first Amendment where the regulation conflicts with express federal regulation. For example, in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), the Court considered a challenge to a California wine pricing law on the grounds that it violated the Sherman Antitrust Act. Although the Court noted that the "*Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system*," the Court also stated that where a state establishes other types of liquor

regulations, such as price maintenance, that "these controls may be subject to the federal commerce power in appropriate situations." *Id.* at 110 (emphasis added). In the case before it, the Court concluded that the federal interest embodied in the Sherman Antitrust Act to promote free enterprise outweighed the state's unsubstantiated interest in protecting small retailers. *Id.* at 114. The Court in *Midcal*, therefore, recognized that a state's Twenty-first Amendment powers may be limited where the state establishes a regulation that does not directly relate to the importation, sale or distribution of liquor and that squarely conflicts with the exercise of federal regulatory power over interstate commerce.

In a third area of cases, the Court has recognized that certain provisions of the Constitution, other than the Commerce Clause, can limit a state's power to regulate under the Twenty-first Amendment. For example, in *Craig v. Boren*, 429 U.S. 190 (1976), the Court addressed the relationship between the Equal Protection Clause and the Twenty-first Amendment in the context of gender classifications. In *Craig v. Boren*, the Court examined a state law that provided a higher minimum drinking age for men than for women with respect to purchases of beer. The Court declined to follow *Young's Market* to find that a classification recognized by the Twenty-first Amendment could not be forbidden by the Fourteenth Amendment, but also importantly recognized a critical difference between the economic discrimination in *Young's Market* and the gender classifications in the case before it. Indeed, the Court distinguished the *Young's Market* case as involving "a regulatory area [the importation of intoxicants] where the State's authority under the

Twenty-first Amendment is transparently clear" as well as "purely economic matters that traditionally merit only the mildest review under the Fourteenth Amendment." 429 U.S. at 207.

In another non-Commerce Clause case, *Department of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341 (1964), the Court was faced with a challenge to state taxes assessed on liquor imported from outside of the United States. In holding that the Kentucky tax at issue violated the Export-Import Clause of the Constitution, the Court did not repudiate the holding in *Young's Market* with respect to a state's power to control the importation of alcoholic beverages from other states, but rather limited the state's power to regulate alcoholic beverages imported from foreign countries. Indeed, the Court reaffirmed the broad powers of the states under the Twenty-First Amendment in stating that:

> We have no doubt that under the Twenty-first Amendment Kentucky could not only regulate, but could completely prohibit the importation of some intoxicants, or of all intoxicants, destined for distribution, use, or consumption within its borders. There can surely be no doubt, either, of Kentucky's plenary power to regulate and control, by taxation or otherwise, the distribution, use, or consumption of intoxicants within her territory after they have been imported. All we decide today is that, because of the explicit and precise words of the Export-Import Clause of the Constitution, Kentucky may not lay impost on these imports from abroad.

377 U.S. at 346. The Court further distinguished the case before it from *Young's Market* by observing that the matter before it did not involve "the generalized authority given to Congress by the Commerce Clause, but a constitutional

provision which flatly prohibits any state from imposing a tax upon imports from abroad." 377 U.S. at 344.

As the above review of cases demonstrates, the principles underlying the Court's holding in *Young's Market* stood firm until the *Bacchus* opinion in 1984. At no point during this fifty year period did the Court indicate that a state's power to regulate the importation of alcoholic beverages into its borders for use therein was limited by the dormant Commerce Clause. At no time during this period did the Court indicate that it would invalidate a state tax on imported alcoholic beverages where that regulation did not also conflict with federal regulation of interstate or foreign commerce or attempt to regulate liquor transported through the state. Furthermore, at no point until *Bacchus* did the Court indicate that a statute must implicate "central concerns" of the Twenty-first Amendment in order to prevail over the Commerce Clause. From *Young's Market* to *Bacchus*, therefore, the case law of the Court clearly supported the right of a state under the Twenty-first Amendment to regulate the importation of alcoholic beverages into the state by means of an import tax.

The sharp departure from previous case law made by *Bacchus* is indisputable. Justice Stevens, joined by Justices Rehnquist and O'Connor, noted the departure from long-standing precedents of the Court and commented upon it at length in his dissenting opinion in *Bacchus*. Commentators analyzing *Bacchus* have also noted that the Court in *Bacchus* "went beyond Section Two precedents and found a new interpretation of the meaning of Section Two itself." Comment, *The Twenty-first Amendment and the Commerce Clause: What Rationale Supports Bacchus Imports?*, 13 Hastings Const. L.Q. 361, 382 (1986). Even Beam must be said to have recognized the departure made by the Court in *Bacchus* as it did not challenge the Georgia statute at issue until after the decision in *Bacchus*. J.A. 10-13.

Bacchus, therefore, clearly established a new principle of law in Commerce Clause/Twenty-first Amendment jurisprudence. Additionally, the Georgia Supreme Court opinion, based upon *Bacchus*, established a new principle of law by effectively overturning the prior opinion of the court in the case of *Scott v. State*, 187 Ga. 702, 2 S.E.2d 65 (1939). As noted earlier, the Georgia Supreme Court in *Scott v. State* upheld the constitutionality of a predecessor to the statute at issue, finding that the right of a state to prohibit or regulate the importation of alcoholic beverages was not limited by the Commerce Clause. The holding in *Scott* remained unchallenged until the filing of Beam's refund claim in 1985.

In light of the Georgia Supreme Court decision in *Scott* as well as the decisions of the Court, there was no reason for Georgia to expect that its pre-*Bacchus* statute would be invalidated – even if the statute had the effect of protecting the local economy. Up until *Bacchus*, such a purpose or effect was permissible so long as the state's regulation fell within the express powers of the Twenty-first Amendment to regulate the importation of alcoholic beverages.

B. Retroactive Application Of *Bacchus* Will Not Further The Purpose Of The Commerce Clause.

Bacchus also easily meets the second part of the *Chevron Oil* test which requires a determination of whether

retroactive application of the rule in question will further the rule's purpose. As in *ATA*, the Commerce Clause does not dictate retroactive application of the new principle of law established in this case. Although the central purpose of the Commerce Clause is to create an area of free trade between the states, "it is not the purpose of the Commerce Clause to prevent legitimate state taxation of interstate commerce." *ATA*, 58 U.S.L.W. at 4708. Because the pre-*Bacchus* statute was a "legitimate state taxation of interstate commerce" prior to the decision in *Bacchus*, the Commerce Clause would not be furthered by a retroactive application of *Bacchus* and the Georgia Supreme Court decision based upon it.

Furthermore, contrary to Beam's arguments, retroactive application is not necessary to deter future violations by the State of Georgia. Indeed, as the Georgia Supreme Court noted in its decision in this case, such a concern has been rendered moot by the fact that the Georgia legislature acted promptly after the decision in *Bacchus* to repeal the statute at issue and to enact an amendment which the Georgia Supreme Court has upheld under the principles established in *Bacchus*. J.A. 103; *see Heublein, Inc. v. State*, 256 Ga. 578, 351 S.E.2d 190 (1987), *appeal dismissed*, 483 U.S. 1013 (1987).

Notwithstanding the Georgia Supreme Court opinion in *Heublein*, Beam argues that Georgia needs to be deterred because the 1985 Amendment does not comport with the *Bacchus* decision. Beam's attempt to reargue the *Heublein* case here, which case this Court declined to

review, is simply misplaced and misleading.[6] The 1985 Amendment has been declared constitutional and is not at issue in this case. The passage of the 1985 Amendment, therefore, does not signal a disregard by Georgia for the opinions of this Court but, on the contrary, an effort to remedy the perceived infirmities of the pre-*Bacchus* statute.

Retroactive relief of the type sought by Beam is also not necessary to redress the alleged competitive imbalance effected by the pre-*Bacchus* statute. As this Court has noted, "[i]t was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing business." *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 288 (1977) (citations and internal quotations omitted). Indeed, if the decision in *Bacchus* were applied retroactively and Beam received the full refund of taxes that it has sought,[7] then Beam would pay no portion of its share of the tax burden. Certainly, the Commerce Clause was not intended to provide Beam with protection from paying its fair share of taxes.

Since the purpose of the Commerce Clause to promote free trade is not enhanced by retroactive application

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[6] In the 1987 case, Heublein argued that the 1985 Amendment was unconstitutional regardless of its purpose. 256 Ga. at 584, 351 S.E.2d at 196. Contrary to Beam's assertions in this case, Heublein did not fail to challenge the purpose of the statute because of any lack of evidentiary support.

[7] Beam is seeking a refund of *all* taxes that it paid during the refund period.

in this case and the effect of retroactive application might be to relieve Beam of its duty to pay its fair share of the tax burden, retroactive application of *Bacchus* is not favored.

C. Retroactive Application Of *Bacchus* Would "Produce Substantial Inequitable Results."

A balancing of equities in this case, as called for by the third part of the *Chevron Oil* test, clearly favors prospective application of *Bacchus* and the Georgia Supreme Court decision based upon it. As in *ATA*, the State of Georgia collected the taxes at issue in good faith reliance on the precedents of this Court and its own supreme court. As discussed in Part I(A), *supra*, the decision in *Bacchus* marked a sharp departure from longstanding precedents of this Court which Georgia had no reason to expect. Indeed, not even Beam can seriously argue that Georgia acted in bad faith in collecting taxes under the pre-*Bacchus* statute when it did not challenge the statute until April of 1985, almost one year after the decision in *Bacchus*. Certainly, Georgia was entitled to rely on the principles enunciated by this Court in *Young's Market* and reaffirmed by the Court in cases up until the decision in *Bacchus*.

Furthermore, as the Court in *ATA* pointed out, Georgia should "not be faulted for continuing to rely on its statute after its highest state court upheld the constitutionality of the tax." *ATA*, 58 U.S.L.W. at 4709. In *Scott v. State*, the Georgia Supreme Court, relying on the Court's opinions in *Young's Market* and its progeny, upheld the predecessor to the pre-*Bacchus* statute. The decision in

Scott remained unchallenged for forty years until Beam and several other taxpayers challenged the pre-*Bacchus* statute in tax refund actions in 1985. In invalidating the pre-*Bacchus* statute in this case, the Georgia Supreme Court overruled clear past precedent on which the State had reasonably relied.

Armed with a decision of its highest court and longstanding precedents of this Court, Georgia had no reason to foresee a change in the law that would invalidate its statute. As this Court has noted on many occasions, protecting reasonable reliance upon a statute is an important and valid concern, even where "that requires allowing an unconstitutional statute to remain in effect for a limited period of time." *Heckler v. Mathews*, 465 U.S. 728, 746 (1984); *see also Lemon v. Kurtzman*, 411 U.S. 192, 209 (1973) ("[S]tate officials and those with whom they deal are entitled to rely on a presumptively valid state statute, enacted in good faith and by no means plainly unlawful.")

Protecting reasonable reliance upon a presumptively valid statute is particularly important where retroactive application of a decision threatens extreme financial hardship and disruption of governmental operations. *ATA*, 58 U.S.L.W. at 4709. Retroactive application of *Bacchus* would create substantial economic hardship and disruption for Georgia. Indeed, Georgia would be faced with a tremendous financial burden if it were required to pay some $30,000,000 or more in tax refunds at a time when the state is literally struggling to find revenues to pay for

billions of dollars in infrastructure needs.[8] Furthermore, contrary to Beam's arguments, a retroactive application that required Georgia to issue "credit memos" would be just as burdensome and disruptive, as these "credit memos" would entail substantial administrative costs and lessen already declining revenues of the State. Such financial pressure and disruption would not be justified where the taxes were collected and spent in good faith and where retroactive relief might very well result in a windfall to Beam, who is seeking a total absolution of tax liability for the three years at issue.

In light of Georgia's good faith reliance upon the pre-*Bacchus* statute and the tremendous financial burden a refund would impose on the State, the benefit of a refund to Beam is far outweighed by the harm that would be inflicted upon the State's citizens and government.

II. BEAM IS NOT ENTITLED TO RETROACTIVE RELIEF UNDER THE HOLDING IN *McKESSON*.

Unlike the Florida Supreme Court decision involved in *McKesson*, the Georgia Supreme Court decision at issue here was not based upon established principles of Commerce Clause jurisprudence, but upon a new principle of law. Because this case does not involve the application of

[8] There are two other pending refund actions which are identical to this case. The plaintiffs in these cases seek refunds in the amount of approximately 28 million dollars. *Heublein, Inc. v. Georgia*, Civil Action No. 87-3542-6 (DeKalb Superior Court filed April 24, 1987) and *Joseph E. Seagram & Sons, Inc. v. Georgia*, Civil Action No. 87-7070-8 (DeKalb Superior Court filed September 4, 1987).

settled principles of law as in *McKesson*, the reasonings and findings in *McKesson* are inapplicable here. *See ATA*, 58 U.S.L.W. at 4708 (application of settled principles of law involves different considerations than application of new law).

The issue before the Court in *McKesson* was whether Florida could give prospective relief only to a taxpayer who had paid taxes under a statute enacted after the decision in *Bacchus*, but which did not surmount the constitutional violations addressed in *Bacchus*. Because the Florida decision invalidating the post-*Bacchus* statute involved "only the application of settled Commerce Clause precedent," the Court did not analyze the decision under *Chevron Oil*, but rather examined Florida's obligation to provide relief under the Due Process Clause. *ATA*, 58 U.S.L.W. at 4708. The Court concluded that Florida had a constitutional duty to provide retroactive relief to McKesson because the taxes at issue were paid under a statute that violated settled principles of law when enacted and implemented and because the taxes were paid under duress. In reaching this conclusion, the Court found that Florida could "hardly claim surprise at the Florida courts' invalidation" of the post-*Bacchus* statute as it was essentially identical to the scheme invalidated in *Bacchus*. *McKesson*, 58 U.S.L.W. at 4673. The Court also found that Florida failed to take reasonable precautions to limit its liability in that it continued to require McKesson to pay taxes under the statute even after the statute had been declared unconstitutional by the lower court.[9]

[9] After the trial court declared that the statute was unconstitutional, Florida appealed the decision which resulted in a

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Legally and factually, the instant appeal is completely different from *McKesson*. As discussed in depth in Section I(A), this case involves the application of a new principle of law as established in *Bacchus*. The statute at issue in this case was enacted prior to *Bacchus* and was implemented in good faith in reliance on the precedents of this Court and of the Georgia Supreme Court. Not until the decision in *Bacchus* did Georgia have any reason to question the validity of its statute. On the contrary, the statute at issue in *McKesson* was enacted after *Bacchus* with full knowledge of the principles established in that case. Because this appeal involves a pre-*Bacchus* statute, as opposed to a post-*Bacchus* statute, the analysis employed in *ATA*, not *McKesson*, governs.

In addition to involving the application of a new principle of law, the instant case is distinguishable from *McKesson* in a number of other significant ways. In *McKesson*, the taxpayer challenged Florida's post-*Bacchus* statute while it was in effect and paid taxes thereunder throughout the period that it was challenging the statute. Even after the trial court declared the statute to be unconstitutional, McKesson was required to continue paying the discriminatory tax. *See supra* n.9.

On the contrary, Beam did not challenge the Georgia statute until all the taxes at issue had been paid and the

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stay of the trial court's decision. Florida continued to collect the tax while the decision was being appealed and did not join in McKesson's motion to vacate the stay. Furthermore, Florida successfully opposed McKesson's efforts to have the taxes escrowed during the litigation. 58 U.S.L.W. at 4667, n.5.

statute had been repealed. Unlike McKesson, Beam did not seek any predeprivation remedy such as injunctive relief or the establishment of an escrow fund into which the import tax could have been paid. Beam simply paid the taxes at issue without any protest and without any threatened enforcement action by the State. In short, the circumstances under which McKesson paid its taxes to Florida and which prompted the Court to find that the taxes were paid under duress do not exist in this case.[10]

The instant appeal bears no resemblance to the case before the Court in *McKesson* and thus *McKesson* is not controlling here. Because this case involves the application of new principles of law, Georgia is not obligated to provide Beam with a backward looking remedy.

[10] Taxes paid prior to *any* enforcement action are not paid under duress. *See, e.g., United States v. New York & Cuba Mail Steamship Co.*, 200 U.S. 488 (1906) (payment of an illegal demand with full knowledge of the facts rendering it illegal, without any coercion by actual or threatened action by the government, is a voluntary payment and not one made under duress); *cf. Ward v. Board of County Commissioners*, 253 U.S. 17, 23 (1920) (taxes were paid involuntarily where they were tendered to avoid a distress sale of the taxpayer's property).

CONCLUSION

The Georgia Supreme Court correctly applied the *Chevron Oil* test to its decision invalidating O.C.G.A. § 3-4-60, as it existed during the claim period, and, in so doing, properly denied a refund to Beam. Accordingly, based on the arguments presented herein, it is respectfully requested that the Court affirm the ruling of the Georgia Supreme Court.

Respectfully submitted,

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